

## Playing Politics: A Review of Eligibility Rules and Campaign Restrictions for Servicemembers Who Are Nominees or Candidates for Civil Office

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A 2009 survey by the National Network of Legislators in the Military and the National Conference of State Legislators identified sixty-five state legislators serving in the Armed Forces as Reserve or National Guard members.<sup>2</sup> Almost half of them deployed while serving as members of their respective legislatures.<sup>3</sup> Countless other Reserve and Guard members, perhaps in the hundreds, hold civil offices at other levels of federal, state, and local government.<sup>4</sup> While the topic of civil office candidacy may seem of little relevance to career active component servicemembers, individuals who serve in the Reserves or National Guard know that running for civil office can be a challenging issue within their ranks. Eligibility rules for servicemembers seeking civil office are often misunderstood, and the relatively new restrictions on how they may conduct their campaigns are equally misconstrued.

With the 2010 election season just around the corner, a review of the guidelines for servicemembers seeking civil office is important, not only for servicemembers who are potential candidates, but also for judge advocates who advise individual servicemembers and commanders on these issues. This article examines Department of Defense (DoD) rules for servicemembers who are nominees or candidates for civil office using the most recent guidance found in DoD Directive 1344.10, *Political Activities by Members of the Armed Forces*.<sup>5</sup> The article begins by exploring the directive's definition of "civil office," and then proceeds to examine the eligibility rules and campaign restrictions for servicemembers seeking civil office.

### "Civil Office" Defined

In February 2008, the DoD updated DoD Directive 1344.10,<sup>6</sup> which covers limitations on political activities of members of the U.S. Armed Forces. The directive reiterates long-standing DoD policy that servicemembers on active duty should not "engage in partisan political activity," and that servicemembers not on active duty should "avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement . . . ."<sup>7</sup> These baseline tenets are the foundation for rules regarding whether servicemembers may be nominees or candidates for civil office, the most visible of which is the rule prohibiting servicemembers from being nominees or candidates for civil office if they are on active duty or under a call to active duty for more than 270 days.<sup>8</sup> This limitation clearly reflects a deep concern that partisan political activity by servicemembers on extended active duty may unduly entangle the military in the civil branch of government.

But what does the directive mean by the term "civil office"? Does it mean any "public" office, or is it more specific? Paragraph E2.3 of the directive defines "civil office" as follows:

A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.<sup>9</sup>

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<sup>2</sup> See Press Release, Nat'l Conference of State Legislatures, State Legislators in U.S. Military Serve Country and State: Sixty-five State Lawmakers in Armed Forces, Nov. 11, 2009, <http://www.ncsl.org/PressRoom/PressReleaseLegislatorsServingintheMilitary/tabid/19082/Default.aspx>.

<sup>3</sup> *Id.*

<sup>4</sup> Current examples include Senator Lindsey Graham of South Carolina, a colonel and judge advocate in the Air Force Reserve and the only current military member in the U.S. Senate; Congressman Steve Buyer of Indiana, a colonel and judge advocate in the Army Reserve; Governor Mark Sanford of South Carolina, a captain in the Air Force Reserve; and Mayor Setti Warren of Newton, Massachusetts, an intelligence officer in the Navy Reserve.

<sup>5</sup> U.S. DEP'T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (19 Feb. 2008) [hereinafter DODD 1344.10]. Among other issues, the Directive implements 10 U.S.C. § 973(b) through (d), which addresses holding and exercising the functions of civil office by Regular officers, as well as retired Regular officers and Reserve officers serving on active duty for a period in excess of 270 days.

<sup>6</sup> *Id.* para. 1.1.

<sup>7</sup> *Id.* para. 4.

<sup>8</sup> *Id.* para. 4.2.2.

<sup>9</sup> *Id.* enclosure 2, para. E2.3.

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A lot is packed into the definition. First, the definition includes offices at the federal, state, and local level, regardless of the size or supposed importance of the office. For example, the limitations in DoD Directive 1344.10 are just as applicable to a servicemember seeking election to a county supervisor position as they are to a servicemember seeking election to state attorney general or even the U.S. House of Representatives. Second, the definition makes no distinction between *appointed* offices and *elective* offices. Thus, a servicemember seeking an appointed state judge position must comply with DoD Directive 1344.10 to the same extent as a servicemember seeking an elective state judge position. On the other hand, the definition is not so broad as to include *every* possible appointed or elective office that a servicemember may seek. For instance, the election of a servicemember to the office of deacon at his local church is not within the scope of the directive, nor is the appointment of a servicemember to president of her neighborhood swim club. Those offices do not exercise the “authority of civil government” and, consequently, are outside the scope of DoD Directive 1344.10. Finally, note the definition’s approach to positions in civilian law enforcement, fire departments, and rescue squads. Although these positions are no doubt viewed by the average citizen as “civil office” positions (especially law enforcement positions), they are not considered civil office positions for purposes of the directive unless they are elective positions. Thus, an Army Reserve Soldier who is hired to a non-elective position as a civilian police officer is not subject to the prohibitions regarding holding and seeking a civil office. In contrast, if the Soldier later enters the race for an elective county sheriff position, he is clearly seeking a “civil office” that is subject to the restrictions laid out in DoD Directive 1344.10.

## Eligibility for Civil Office

### *Specific Guidelines*

Having clarified the definition of “civil office” in DoD Directive 1344.10, we now turn to the specific rules regarding eligibility for civil office.<sup>10</sup> Assuming that the office in question meets the definition of civil office under DoD Directive 1344.10, the next step in deciding whether the individual is eligible for the office is to determine if the servicemember is a Regular member of the Armed Forces on active duty (i.e., a Regular component member).<sup>11</sup> The bottom line is that Regular component members on active duty are prohibited from being nominees or candidates for civil office.<sup>12</sup> This limitation clearly has its genesis in the general policy prohibiting members on active duty from engaging in partisan political activity. However, as with most prohibitions involving civil office issues, an exception is possible if the servicemember receives permission from the relevant service Secretary.<sup>13</sup> An example is the case of a career, Regular component servicemember who plans to seek and hold civil office immediately upon retirement from the military. If the servicemember intends to retire in October but wants to be on the ballot for an elective civil office in the November election, he must file for candidacy in June. In this situation, the servicemember must seek permission from the service Secretary in order remain on active duty as a candidate between the June filing and the October retirement. If the request is granted, then the servicemember may remain a candidate between the June filing and retirement from active duty.

Contrast that example with the servicemember who is *not* a Regular member of the Armed Forces (i.e., is either a Reserve or Guard member or a retired Regular member). In this situation, eligibility to be a nominee or candidate depends on the member’s active duty status. The central question is as follows: Is the servicemember on active duty, and, if so, for how long? If the Reserve member, Guard member, or retired Regular member is *not* on active duty, then he may be a nominee or candidate for civil office without any requirement to seek permission from the military. If the Reserve member, Guard member,<sup>14</sup> or retired Regular member *is* on active duty,<sup>15</sup> then he or she *may* be eligible to be a nominee or candidate depending on the length of the active duty tour. If the call or order to active duty is for *more than* 270 days, then the member

<sup>10</sup> See Appendix, *infra*, for a step-by-step guide to civil office eligibility.

<sup>11</sup> Regular Component members are those Soldiers, Sailors, Airmen, and Marines who serve in continuous service on active duty in both peace and war. See 10 U.S.C. § 3075, 8075 (2006).

<sup>12</sup> DoDD 1344.10, *supra* note 5, para. 4.2.2.

<sup>13</sup> *Id.* para. 4.2.2. This paragraph states that a Regular member, or a retired Regular or Reserve component member on orders for active duty for more than 270 days may not be a nominee or candidate for civil office “except when the Secretary concerned grants permission.” See *infra* pp. 97–98 (providing more specific coverage of the requirement to gain Secretarial approval).

<sup>14</sup> See *infra* pp. 99–102, *Campaign Limitations on Nominees/Candidates on Active Duty* (discussing whether National Guard duty pursuant to title 32, United States Code (e.g., example, annual training duty, or active duty for training) constitutes “active duty” for purposes of DoD Directive 1344.10).

<sup>15</sup> On occasion, retired Regular members may be called back to active duty. Pursuant to 10 U.S.C. § 688(a), a retired Regular member may be ordered to active duty “by the Secretary of the military department concerned at any time.” 10 U.S.C. § 688(a) (2006).

is prohibited from being a nominee or candidate, except when the Secretary concerned grants permission.<sup>16</sup> If the call or order to active duty is for *270 days or fewer*, the member may become a nominee or candidate “provided there is no interference with the performance of military duty.”<sup>17</sup> In this situation the servicemember is not required to obtain permission to remain or become a nominee or candidate but must be careful to comply with other limitations, such as the rules prohibiting the conduct of campaign activities while on active duty, which will be addressed later in this article.

It is important to emphasize what the 270-day rule means in practical terms. The rule does not mean that the restrictions in the directive *begin* on day 271 of active duty. For example, some servicemembers have interpreted the rule to mean that during a call or order to active duty they may remain a candidate for civil office through day 270 of the active duty order and are only required to withdraw from the candidacy upon reaching day 271 of active duty. This is a faulty interpretation of the directive. Instead, the directive requires that from the *first day* of an active duty order exceeding 270 days, the Reserve or Guard member cannot be a candidate or nominee. In this regard, paragraph E2.2 of the directive is very clear: “Any prohibitions or limitations this directive triggers by a call or order to active duty for more than 270 days begins on the first day of the active duty.”<sup>18</sup> Consequently, a Reserve or Guard member who receives orders for a 365-day active duty tour is prohibited on *day one* of active duty from being a nominee or candidate for civil office. Day 270 of the active duty tour is not the time to begin paying attention to the restrictions of DoD Directive 1344.10.

Not surprisingly, servicemembers have been creative in seeking ways around the 270-day rule. Some servicemembers and units have proposed “cobbling” or piecing together multiple active duty orders of shorter duration as a way around the 270-day rule. For instance, instead of issuing an order calling a Reserve or Guard member to active duty for 365 days, a unit might issue an initial order for 185 days, followed by a short break from active duty (from one day to perhaps a week or two), followed by a second order calling the servicemember back to active duty for an additional 180 days. By doing this, the unit has technically avoided the 270-day trigger and reaped the benefit of having the servicemember on active duty for most of the year anyway. Similarly, the servicemember has benefited by remaining a nominee or candidate during the active duty periods without having to seek permission from the service Secretary. Although the directive does not speak directly to this scenario, commanders should avoid issuing orders in this manner. Paragraph 4.1.5 of the directive states, in part, “Activities not expressly prohibited may be contrary to the spirit and intent of this Directive,” and, “Any activity that . . . is otherwise contrary to the spirit and intention of this Directive shall be avoided.”<sup>19</sup> The intentional “cobbling” together of orders to avoid the 270-day rule is contrary the intent of the DoD with regard to eligibility to seek civil office. After all, the longer the tour of active duty, the more likely it is that a servicemember’s candidacy will interfere with the performance of duty and bring into question whether the candidacy implies official sponsorship, approval, or endorsement by the military.<sup>20</sup>

### *Requesting Permission to Become a Nominee or Candidate*

As mentioned previously, despite the general limitations on servicemembers being nominees or candidates for civil office while on active duty tours of longer duration, they may request an exception by seeking permission from their service Secretary.<sup>21</sup> This requirement for secretarial approval is a major change. Under the previous directive, the Secretary *or the Secretary’s designee* could grant or deny the request.<sup>22</sup> The updated DoD Directive 1344.10 now explicitly states, “[T]he Secretary concerned may NOT delegate the authority to grant or deny such permission.”<sup>23</sup> This is a clear message from the

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<sup>16</sup> DODD 1344.10, *supra* note 5, para. 4.2.2. Similar to the case of the Regular member who is granted permission to become a nominee or candidate while on active duty, if the Secretary concerned grants permission for a Reserve component member or retired Regular member to remain or become a candidate while on active duty for more than 270 days, the member must not participate in any campaign activities while on active duty pursuant to paragraph 4.3.3 of the Directive. A discussion of what constitutes “campaign activities” is provided later in this article in the section entitled *Limitations on Campaigning for Civil Office*.

<sup>17</sup> *Id.* para. 4.2.3.

<sup>18</sup> *Id.* enclosure 2, para. E2.2.

<sup>19</sup> *Id.* para. 4.1.5.

<sup>20</sup> In fact, even servicemembers serving shorter tours of 270 days or less may be prohibited from remaining as nominees or candidates if their candidacy interferes with the performance of duty. *See id.* para. 4.2.3.

<sup>21</sup> *Id.* para. 4.2.2.

<sup>22</sup> U.S. DEP’T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY para. 4.2.2 (2 Aug. 2004). This version of the directive was superceded by the current directive on 19 February 2008.

<sup>23</sup> DODD 1344.10, *supra* note 5, para. 4.2.2.1. The term “Secretary concerned” is defined in 10 U.S.C. § 101(a)(9) as follows:

(A) the Secretary of the Army, with respect to matters concerning the Army;

DoD that running for civil office while on longer tours of active duty will be the exception and not the rule and will receive the highest scrutiny.

### *Acknowledgment of Limitations*

The directive states at paragraph 4.3.5 that servicemembers on active duty who are nominees or candidates for civil office must complete an acknowledgement of limitations memorandum.<sup>24</sup> This requirement applies to *any* nominee or candidate who is on active duty, whether a Regular component or Reserve or Guard member, whether on a long or short tour of active duty, and whether they were required to gain permission from the service Secretary to be a nominee or candidate. The acknowledgment memorandum ensures that the servicemember is aware of the requirements to request permission to be a nominee or candidate and emphasizes that he may remain a nominee or candidate only as long as the candidacy does not interfere with the performance of military duty. The memorandum also ensures that the servicemember is aware of the directive's very specific limitations on how the servicemember may conduct his campaign, a subject that is discussed later in this article.

Also, the directive requires that servicemembers who are required to gain permission to be a nominee or candidate sign the acknowledgement before permission may be granted. In contrast, servicemembers who are not required to gain permission must sign the acknowledgement within fifteen days of becoming a nominee or candidate, or within fifteen days of entry on active duty if already a nominee candidate.<sup>25</sup> The memorandum must be forwarded through the servicemember's immediate supervisor to the first general officer in the chain of command.<sup>26</sup> A sample acknowledgement of limitations memorandum is located at enclosure 4 of DoD Directive 1344.10.

### *Special Exceptions Regarding Eligibility for Civil Office*

A final point regarding eligibility to seek civil office pertains to several special exceptions noted specifically in the directive. Notwithstanding the restrictions addressed above, any *enlisted* servicemember may seek and serve in certain nonpartisan civil offices *even while on active duty*. These offices are notary public, or a member of a school board, neighborhood planning commission, or similar local agency.<sup>27</sup> This exception comes with the usual caveat that the offices will be held in a non-military capacity and that there will be no interference with the performance of military duties.<sup>28</sup> In addition, warrant and commissioned officers may seek and serve as members on independent school boards located exclusively on a military installation.<sup>29</sup> The position must be non-partisan, must be held in a non-military capacity, and must not interfere with the performance of military duties.<sup>30</sup>

### **Limitations on Campaigning for Civil Office**

Recent examples of questionable campaign activity by servicemembers running for civil office include engaging in behind-the-scenes campaign activities while on active duty,<sup>31</sup> using military rank and service affiliation without providing a

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(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Department of the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and

(D) the Secretary of Homeland Security, with respect to matters concerning the Coast Guard when it is not operating as a service in the Department of the Navy.

<sup>24</sup> *Id.* para. 4.3.5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* para. 4.2.4.1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* para. 4.2.4.2.

<sup>30</sup> *Id.*

<sup>31</sup> Mark Kirk, a Navy reservist and candidate for the U.S. Senate seat in Illinois, was accused in July 2009 of using the Internet to send "tweets" from his campaign's Twitter™ account while on duty at the Pentagon's National Military Command Center, see Zach Christman, *Mark Kirk's Twitter Trouble*, nbcchicago.com, July 30, 2009, available at: <http://www.nbcchicago.com/news/politics/Mark-Kirks-in-Twitter-Trouble-52088462.html>.

proper disclaimer,<sup>32</sup> and displaying large photographs of the candidate in military uniform on campaign websites.<sup>33</sup> These activities foster legitimate concerns from the general public, as well as from rank-and-file servicemembers, as to whether the candidacy interferes with the performance of duty or represents official sponsorship, approval, or endorsement by the military. To address these very concerns, the new DoD Directive 1344.10 added explicit limitations on campaign activities, as detailed below.<sup>34</sup> A careful reading of the limitations reveals some important points. First, although the rules are much more restrictive for nominees or candidates on active duty, they also include very specific limitations for nominees or candidates not on active duty. Second, the rules are broad in scope with regard to duty status, extending even to campaign activities of National Guard members *serving in a non-federal status*.<sup>35</sup> Consequently, all servicemembers who are nominees or candidates for civil office, whether on active duty or not, and whether Regular, Reserve, Guard, or retired members, should review DoD Directive 1344.10 carefully to ensure compliance with the new limitations.

#### *Campaign Limitation on Nominees or Candidates NOT on Active Duty*

For purposes of reviewing campaign limitations for servicemembers in non-active duty situations, presume that the nominee or candidate is a traditional Reserve or Guard member (or Regular retiree) who is not currently serving a standard active duty tour (such as an active duty mobilization or deployment in support of a war or contingency operation, or any type of annual training, active duty for training, or active duty for special work). In this regard, the directive's main focus is with campaign literature, which includes websites, videos, television, and conventional print advertisements.<sup>36</sup> The directive gives a very specific list of the do's and don'ts of campaign literature,<sup>37</sup> emphasizing the proper use of military information and photographs. Simply put, a nominee or candidate not on active duty may do the following:

- Use military information such as rank, grade, and service affiliation under certain conditions. Candidates may use this information in campaign literature but “must clearly indicate their retired or reserve status.”<sup>38</sup>
- Use other military information, such as military duty title or position, under certain conditions. The candidate may use current or former information in campaign literature when displayed with other, non-military biographical information and when accompanied by a “prominent and clearly displayed disclaimer . . . .”<sup>39</sup> The disclaimer must disavow endorsement by the DoD or the particular military department.
- Use photographs in military uniform under certain conditions. The same rules regarding the use of other military information, described above, apply: The photograph must be displayed with non-military biographical information, and must have a disclaimer.<sup>40</sup>

As previously mentioned, approval to use the information described above is conditioned on the nominee or candidate complying with specific requirements of the directive, such as disclosing retired or reserve status, limiting use of the information to biographical situations, and providing disclaimers. The DoD's obvious concern is that a candidacy not give the impression of official sponsorship, approval, or endorsement by the military.

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<sup>32</sup> In May 2008, the Montana Republican Party accused Jim Hunt, a retired Army National Guard member and candidate for the U.S. House of Representatives, of repeatedly using his military photographs and military rank and affiliation on his campaign website without providing disclaimers as required by DoDD 1344.10, paragraph 4.3.1.2. DoDD 1344.10, *supra* note 5, para. 4.3.1.2. Targeted News Service, Montana GOP: Jim Hunt Says He's Above the Law, May 22, 2008, available at <http://www.highbeam.com/doc/1P3-1483310171.html>.

<sup>33</sup> In March 2008, Adam Cote, a first lieutenant in the Maine Army National Guard and candidate for the U.S. House of Representatives in Maine, was reported to have displayed a large photograph of himself in military uniform on the introductory page of his campaign website. See Kevin Wack, *Playbook Limited for Military Candidates*, PORTLAND PRESS HERALD, Mar. 23, 2008, available at <http://pressherald.maintoday.com/story.php?id=177265&ac=PHnws>.

<sup>34</sup> DoDD 1344.10, *supra* note 5, para. 4.3.

<sup>35</sup> *Id.* para. 2.

<sup>36</sup> *Id.* para. 4.3.1.

<sup>37</sup> *Id.* paras. 4.3.1 and 4.3.2.

<sup>38</sup> *Id.* para. 4.3.1.1.

<sup>39</sup> *Id.* para. 4.3.1.2.

<sup>40</sup> *Id.*

Next, in addition to listing what nominees or candidates on active duty *may* do, the directive lists what they may *not* do. The directive explicitly prohibits nominees or candidates from doing the following:

- Using photographs, drawings and other similar media formats of themselves in uniform as the primary graphic representation in media such as billboards, brochures, websites, flyers, or television commercials.<sup>41</sup>
- Depicting or allowing the depiction of themselves in uniform in a manner that does not accurately reflect their actual performance of duty.<sup>42</sup>

The key point here is the restriction on the use of military photographs as a “primary graphic representation” in campaign media. But what does the “primary graphic representation” restriction mean in practice? The restriction is easier to understand if viewed in concert with the earlier rule that allows photographs in military uniform when displayed with other non-military biographical details. For instance, placing a military photograph in a campaign brochure is allowed if the photograph is located in the biographical section, such as a section entitled “About Bob,” that also mentions the candidate’s work experience, community involvement, hobbies, church affiliation and the like. The placement of the military photograph in that section, along with other biographical photos of the candidate’s life, would keep the photograph from being the “primary graphic representation” of the candidate and make it an appropriate use of the candidate’s military affiliation. On the other hand, if the military photograph is the only photograph in the brochure or is prominently displayed elsewhere, such as on the front page of the brochure, then its use is improper. The photograph is now the “primary graphic representation” in the brochure, magnifying the candidate’s military affiliation beyond the comfort level of the DoD. A similar analysis would apply to the use of a military photograph on the front page of a campaign website as the primary representation of the candidate and the use of a military photograph on a campaign billboard. The bottom line is that if the military photograph is used in a way not associated with non-military biographical information, its use has violated the directive.

#### *Campaign Limitations on Nominees or Candidates on Active Duty*

As stated earlier, the fact that a nominee or candidate is on active duty ups the ante considerably with regard to the nominee or candidate’s freedom to conduct campaign activities. The directive’s baseline rule for nominees or candidates on active duty is that “[a]ny member on active duty who is . . . a nominee or candidate for office . . . may NOT participate in any campaign activities. This includes open and active campaigning and all behind-the-scene activities.”<sup>43</sup>

The guidance is simple enough: No campaign activities, whether out in the open or behind-the-scenes, are permitted while on active duty. This logically raises the question: What is meant by “campaign activities”? The directive settles this by listing a litany of campaign activities an active duty nominee or candidate may *not* conduct, which include the following:

- “Direct, control, manage, or otherwise participate in their campaign, including behind-the-scene activities.”<sup>44</sup>
- “Make statements to, or answer questions from the news media regarding political issues or regarding government policies or activities unless specifically authorized to do so . . . .”<sup>45</sup>
- “Publish or allow to be published partisan political articles, literature, or documents that they have signed, written, or approved that solicit votes for or against a partisan political party, candidate, issue or cause.”<sup>46</sup>

If a candidate on active duty is not swayed by the explicit statement that he “may not participate in any campaign activities,” the above list should relieve all doubts. Not only are candidates prohibited from any open or behind-the-scenes participation in a campaign, they are further prohibited from communicating to the media concerning their campaign and prohibited from publishing anything that solicits votes. Then, as if the point were not already clear, the directive imparts additional clarity by stating what the nominee or candidate *must* do:

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* para. 4.3.2.2.

<sup>43</sup> *Id.* para. 4.3.3.

<sup>44</sup> *Id.* para. 4.3.3.1.

<sup>45</sup> *Id.* para. 4.3.3.2.

<sup>46</sup> *Id.* para. 4.3.3.3.

- “Take affirmative, documented efforts to inform those who work for them and those whom they control that they (the nominees or candidates) may not direct, control, manage or otherwise participate in campaign activities . . . .”<sup>47</sup>
- “Take all reasonable efforts to prevent current or anticipated advertisements that they (the nominees or candidates) control from being publicly displayed or running in any media. This includes Web sites devoted to the nomination or candidacy.”<sup>48</sup>

In sum, not only must active duty nominees or candidates refrain from participating in any campaign activities, they must also inform their campaign staff and workers of this fact and prevent advertisements from running during the time they are on active duty. In addition, campaign websites may not be updated or revised and may be ordered shut down “as the Secretary concerned may direct.”<sup>49</sup> In effect, an active duty candidate is completely barred from doing *anything* with regard to the candidacy while on active duty.

This point is certain to fuel questions in the Reserve and Guard ranks concerning the definition of “active duty.” After all, active duty in the Reserve component world comes in many shapes and sizes, not just longer active duty tours. For instance, in a typical year not involving a long mobilization or deployment, a Reserve component servicemember will perform the traditional “two weeks per year” annual training (AT) requirement, plus a week or more in an active duty for training (ADT) status to satisfy military schooling requirements. In addition, the servicemember may perform other days of active duty in a special work status (ADSW) to meet additional demands of the unit. Does the directive’s ban on campaign activities apply to these routine Reserve component active duty situations? A typical example is a Reserve or Guard member running for civil office who is on ADT orders to attend a five-day military training event. The training schedule may require the servicemember to be in training from 0730 to 1730 each day, but after that, the servicemember is off-duty. Is the servicemember prohibited from engaging in all campaign activities during this five-day period, even behind-the-scenes activities such as phone calls or e-mails to campaign staffers while off-duty in the evening in his hotel room? Expanding the example even further, what about the unique duty situations of the National Guard, such as AT or ADT in a title 32 status (federal funding, but state command and control), or a pure state active duty mission, such as a state activation at the call of the Governor in response to a natural disaster?

Fortunately, these questions can be resolved by reviewing key definitions contained in enclosure 2 of the directive. The enclosure defines “active duty” as follows:

Full-time duty in the active military service of the United States regardless of duration or purpose. Active duty includes full-time training duty; annual training duty; and attendance, while in the active military service, at a school designated as a Service school by law or by the Secretary concerned. For purposes of this Directive only, active duty also includes full-time National Guard duty.<sup>50</sup>

Applying the definition to situations applicable to each of the military components (i.e., the Regular component, the Reserves, and the National Guard) yields the results outlined below.

### *Regular Components*

Regular component members, such as those who serve in the Regular Army, are always on active duty in the full-time active military service of the United States. As a result, a Regular component member who is a nominee or candidate for civil office (assuming permission from the Secretary concerned has been granted) may not conduct any campaign activities while on active duty.

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<sup>47</sup> *Id.* para. 4.3.4.1.

<sup>48</sup> *Id.* para. 4.3.4.2.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* enclosure 4, para. E2.1.



## Reserves

Although Reserve members (such as Army Reserve, Navy Reserve, Marine Corp Reserve, Air Force Reserve, and Coast Guard Reserve) are federal servicemembers at all times,<sup>51</sup> they are *not* always on active duty. In fact, the well-known “drill” weekend is specifically designated “inactive duty training” (IDT)<sup>52</sup> and is not active duty for purposes of the DoD Directive 1344.10 definition of “active duty.” Consequently, a Reserve member on IDT status is not subject to the broad rule prohibiting all campaign activities while on active duty. Rather, the member on IDT status is subject to the other, less prohibitive, campaign restrictions on non-active duty campaigning found in paragraphs 4.3.1 and 4.3.2 of the directive.

Regarding active duty service by a Reserve member, any time a Reserve member is on active duty,<sup>53</sup> whether it is AT, ADT, ADSW, or a mobilization or deployment, the member is performing duty in the active military service of the United States and is barred from engaging in any campaign activities pursuant to paragraph 4.3.3 of the directive.<sup>54</sup> Also, because the directive makes no distinction between the *length* of active duty orders, the ban applies to any active duty tour, to include even a one day active duty order. Thus, to use the previous example, the Reserve nominee or candidate on active duty orders for five days to attend military schooling is barred from performing *any* campaign activities while on orders, to include when off-duty in the evening in the hotel room.<sup>55</sup> The bottom line for Reserve members is that active duty means active duty, regardless of duration; all campaign activities by Reserve members while on any type of active duty are barred.

## National Guard

When analyzing the legality of campaign activities by National Guard members, it is critical to understand that the directive’s limitations on campaigning apply to members of the National Guard “even when in a non-Federal status.”<sup>56</sup> Thus, regardless of the numerous types of National Guard duty that may be performed, National Guard members are, at a minimum, *always* subject to the campaign restrictions found in paragraphs 4.3.1 and 4.3.2 regarding non-active duty campaign activities. Then, if it is determined that the National Guard member is performing active duty as defined by the directive, the member must comply with the more restrictive rules that ban campaign activities while on active duty.

So what type of duty by National Guard members meets the definition of active duty found in the directive? The first, and easiest, place to start is with a federal call or order to active duty pursuant to title 10, U.S. Code, such as a deployment overseas.<sup>57</sup> Title 10 orders place the Guard member in federal status—that is, in full-time active military service of the United States under federal command and control.<sup>58</sup> This situation is no different than a Regular component or Reserve servicemember on federal active duty. The result is that the National Guard nominee or candidate who is on title 10 orders is on “active duty” under the directive and is barred from performing any campaign activities pursuant to paragraph 4.3.3 of the directive.

The next situation involves duty pursuant to title 32, U.S. Code.<sup>59</sup> National Guard members perform various types of title 32 duty, to include the traditional IDT (otherwise known as “drill” duty),<sup>60</sup> the familiar two-week AT duty,<sup>61</sup> required

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<sup>51</sup> For example, Army Reserve and Air Force Reserve members are defined by statute as “all Reserves of the Army [or Air Force] who are not members of the Army [or Air] National Guard of the United States.” 10 U.S.C. §§ 10104, 10110 (2006). These Reserve members have no National Guard affiliation and, therefore, always serve as federal servicemembers, although not necessarily always on active duty.

<sup>52</sup> 37 U.S.C.S. § 206 (LexisNexis 2009).

<sup>53</sup> 10 U.S.C.S. § 101(d)(1) (LexisNexis 2009).

<sup>54</sup> DoDD 1344.10, *supra* note 5, para. 4.3.3.

<sup>55</sup> *Id.* para. 4.3.3.

<sup>56</sup> *Id.* para. 2.

<sup>57</sup> 10 U.S.C. § 12301 (2006).

<sup>58</sup> *Id.* § 101(d)(1). Note that this title 10 statutory definition of active duty defines “active duty” to mean “full-time duty in the active military service of the United States,” and specifically excludes “full-time National Guard duty.” However, the definition of active duty in DoDD 1344.10 specifically *includes* “full-time National Guard duty.”

<sup>59</sup> Title 32, U.S. Code, is entitled “National Guard.”

<sup>60</sup> 32 U.S.C.S. § 502(a)(1) (LexisNexis 2009).

<sup>61</sup> *Id.* § 502(a)(2) (requiring at least fifteen days each year of training in addition to drill duty).

schooling,<sup>62</sup> active duty to conduct title 32 “other” missions,<sup>63</sup> and full-time National Guard duty as a state AGR (active Guard or Reserve) Soldier or Airman.<sup>64</sup> Drill duty does not meet the definition of active duty under the directive because it is not included in the definition of “full-time National Guard duty” found at 10 U.S.C. § 101(d)(5), as further defined below. On the other hand, the other types of title 32 duty situations (e.g., AT, required schooling, “other” missions, and state AGR duty) are clearly included in the definition of “full-time National Guard duty” under 10 U.S.C. § 101(d)(5), as follows:

The term “full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.<sup>65</sup>

This definition covers virtually every type of National Guard title 32 duty conceivable, with the exception of IDT “drill” status as previously mentioned. Accordingly, the typical National Guard member performing non-drill duty under title 32 is performing “full-time National Guard duty” under 10 U.S.C. § 101(d)(5). Because the term “full-time National Guard duty” is included in the definition of active duty in DoD Directive 1344.10, National Guard nominees or candidates who perform non-drill duty under title 32 are barred from engaging in any campaign activities.<sup>66</sup>

Despite the above, there is one remaining duty situation involving the National Guard that is not considered “active duty” for purposes of the directive’s prohibition against active duty campaign activities. That situation is the traditional state active duty under state law, which involves an activation by the state governor to perform state missions, such as relief efforts during natural disasters or responses to civil disturbances. In this capacity, the National Guard member is under the command of the governor and is funded by the state. Because this duty does not fall within the definition of “full-time National Guard duty” under 10 U.S.C. § 101(d)(5) and is, therefore, not under the directive’s definition of “active duty,” a National Guard member who is a nominee or candidate for civil office and performs state active duty is not subject to the directive’s all-out ban from campaign activities. Instead, the member must comply with the directive’s other campaign limitations in paragraphs 4.3.1 and 4.3.2 pertaining to members not on active duty. This is required because, as previously mentioned, the directive states in paragraph 2 that the limitations in paragraphs 4.3.1 and 4.3.2 apply to members of the National Guard, “even when in a non-Federal status.”<sup>67</sup> Be aware, however, that state law may prescribe additional limitations on members’ campaign activities while performing state active duty.

### **Punitive Nature of the DoD Directive 1344.10**

A final point pertains to the punitive nature of DoD Directive 1344.10. Paragraph 4.6.4 states that the directive is a lawful general regulation and that violations of paragraphs 4.1 through 4.5 by persons “subject to the Uniform Code of Military Justice” (UCMJ) are punishable under Article 92, UCMJ. This article has focused exclusively on paragraphs 4.2 and 4.3 of the directive, which fall within the range of punishable sections in the directive. That said, readers should be cautious when analyzing whether suspected violations of paragraphs 4.2 or 4.3 by a Reserve or Guard member actually fall under the jurisdiction of the UCMJ. Although Regular component servicemembers are always under UCMJ jurisdiction,<sup>68</sup> Reserve and Guard members are frequently not subject to the UCMJ. For example, Reserve members are subject to the UCMJ only when in an active duty status or an IDT “drill” status.<sup>69</sup> Hence, a Reserve nominee or candidate not on active duty or IDT status who violates the rules in paragraph 4.3 regarding the proper use of military photographs during a campaign is not subject to UCMJ jurisdiction. Although the chain of command may discipline the Reserve member through administrative measures, they may not pursue action under the UCMJ. Meanwhile, National Guard members are subject to

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<sup>62</sup> *Id.* §§ 504 and 505.

<sup>63</sup> *Id.* § 502(f).

<sup>64</sup> *Id.*

<sup>65</sup> 10 U.S.C. § 101(d)(5) (2006). This definition of “full-time National Guard duty” is identical to the definition found at 32 U.S.C.S. § 101(19).

<sup>66</sup> DoDD 1344.10, *supra* note 5, para. 4.3.3.

<sup>67</sup> *Id.* para. 2.

<sup>68</sup> UCMJ art. 2(a)(1) (2008).

<sup>69</sup> *Id.* art. 2(a)(1) and (3).

the UCMJ only when in a title 10 federal active duty status.<sup>70</sup> They are not subject to the UCMJ when serving in a purely state active duty status or when serving pursuant to title 32 orders. Because service under title 32 orders is still under state command and control, a National Guard nominee or candidate performing any type of title 32 duty who violates the campaign rules found in paragraphs 4.2 and 4.3 of DoD Directive 1344.10 is not subject to UCMJ jurisdiction. As always, however, authority may exist under state law to discipline the National Guard member.

### **Conclusion**

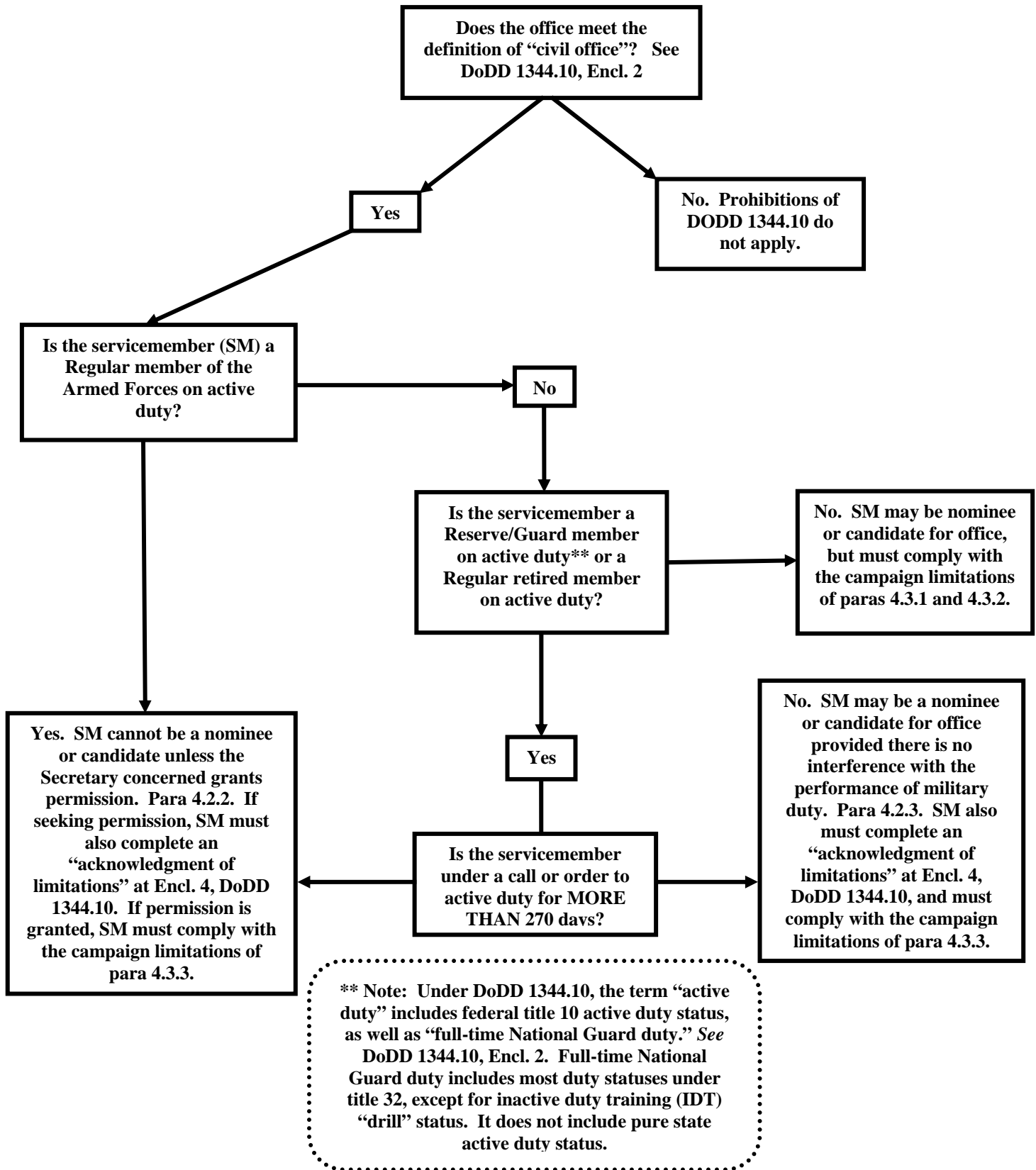
This article examined current DoD policy and restrictions for servicemembers who are nominees or candidates for civil office. Although DoD Directive 1344.10 addresses a myriad of other issues regarding the political activity of servicemembers, questions pertaining to candidacy for civil office are particularly compelling due to the impact that a candidate's conduct may have on the public's perception of the military. Of initial concern in this article was whether the "civil office" in question meets the directive's definition of civil office. The article then turned to the rules regarding servicemember eligibility for civil office, emphasizing the significance that the servicemember's military component and length of active duty tour play in the analysis. Finally, the article focused on the directive's relatively new and very specific limitations on campaigning for civil office, highlighting important differences in application depending on whether the nominee or candidate is or is not on active duty. To ensure that "no stone is unturned" concerning the highly visible and public issues standing at the intersection of military service and political activity, servicemembers and judge advocates alike should research the directive carefully when faced with issues involving candidacy and campaigning for civil office.

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<sup>70</sup> *Id.* art. 2(a)(3).

## Appendix

### Eligibility for Civil Office Under DoD Directive 1344.10



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